IN THE
MISSOURI SUPREME COURT

SUPREME COURT NO. SC87022

GENE R. KUNZIE,

Appellant,

v.

CITY OF OLIVETTE, MISSOURI,

Respondent.

CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS
CIR. CT. NO. 04-CC-000386
HONORABLE ROBERT S. COHEN

MISSOURI COURT OF APPEALS, EASTERN DISTRICT
APP. CT. NO. ED-85119
HONORABLE CLIFFORD AHRENS, NANNETTE BAKER, GLENN NORTON

APPELLANT'S SUBSTITUTE REPLY BRIEF

Respectively Submitted,

Donald K. Murano, MO # 36953
Guinness, Buehler, & Murano LLC
415 North Second Street
St. Charles, Missouri 63301
Tel.(636) 947-7711
Fax (636) 947-7787

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

City of Olivette Ordinances, Municipal Codes and Handbooks

I. STATEMENT OF FACTS[1]

Mr. Gene R. Kunzie, (appellant) filed his Third Amended Petition claiming: In "Count I- Whistle Blower Claim"- that appellant was subjected to whistle blower retaliation for voicing his concerns relating to the City of Olivette's (respondent) alleged disregard for: the lack of Dielman culvert structural integrity, the significant disrepair of the respondent's backhoe, and the lack of access to public buildings for the disabled (collectively referred to as Central Issues); In "Count II-Wrongful Termination In Violation of Public Policy For Plaintiff's Reporting Violations of Olivette's Municipal Code, City Ordinances, Policies, Handbook, Charter, State Laws, and Other Public Policy Interests" a violation of state and local laws, and ; In "Count III- Breach of Contract" a bad faith breach of appellant's contract

[1]Respondent asserts, without explanation, that the "Standard of Review" and "Statement of Facts" in Appellant's Substitute Brief are allegedly "rife with argument" and "not compliant with Supreme Court Rule 84.04 (c)". Respondent has not provided one example of how appellant's "Standard of Review" or "Statement of Facts" are argumentative. Such baseless assertions are presented by respondent, in a "by the way" format through footnote 1 and 2, rather than a formal motion. Such assertions should be summarily discarded by this Court. Thus, appellant will similarly address respondent's assertion in kind through a footnote rebuttal.

right. In summary, appellant contends, through his pleadings, respondent scrutinized, criticized and retaliated against appellant for his exercise of free speech as a whistle blower. (Record on Appeal (ROA) pp. 5-15, 18-29, 32-43, 150-152).

Throughout appellant's pleadings, he contends respondent violated: 1. no less than four (4) statutes; 2. OSHA regulations, 3. respondent's: Charter, ordinances, codes, Safety Manual, Employee Handbook, and; 4. strong public policy interests.

Appellant does not expressly distinguish between respondent's proprietary and governmental functions. Yet it was adequately plead through averments 19 and 30 of the Third Amended Petition that the acts of respondent, which gave rise to the instant lawsuit, were beyond the respondent's charge as a municipal corporation. Averment 19 asserts: "... Municipal Defendant refused to allocate funding to remedy capital improvement concerns...Rather, taxes were diverted from these capital improvement concerns to other political agenda items." Averment 30 asserts "...the Municipal Defendant is not afforded sovereign immunity protection as granted by the State of Missouri, and the Municipal Defendant has purchased liability insurance and has a general liability plan to handle the consequences of employment related actions brought against them." These averments do reference proprietary acts by respondent which have direct application to the instant lawsuit and this Court's review.

Respondent made the admission they maintain liability insurance applicable to appellant's claims with specific reference to RSMo. 537.610.1: "Defendant, does, indeed, maintain liability insurance. See, Exhibit C." (ROA pp. 61, 63). Further, respondent's

municipal government operates under a "Home Rule Charter" as provided by respondent's municipal Charter. (See Appendix to Substitute Brief of Respondent (ASBR) pp. A40- A63). As expressly noted in the respondent's charter: "The citizens of this city will no longer depend upon the General Assembly in Jefferson City for changes or improvements in our governmental structure." (ASBR p. A 42).

Respondent's actions, as plead in appellant's Third Amended Petition, resulted in respondent's: failure to promote appellant; subjecting appellant to significant scrutiny to the level of outward displays of retaliation; respondent did not afford appellant the same benefits and privileges (promotions, pay increases, responsibilities, training, vacation pay, sick leave pay and personal day pay) as other municipal employees that didn't oppose respondent's apparent violation of the law; and ultimately appellant was terminated for raising the Central Issues. Appellant believed that after raising the Central Issues and reporting respondent's continuing violation of the law, he was verbally abused, mocked, admonished and humiliated as retaliation. The asserted claim of retaliation took place in respondent's City Council meetings and via e-mails exchanged between respondent's City Council members and high ranking municipal officers, as supported by business records.

II. STANDARD OF REVIEW

A. THE TRIAL COURT MAINTAINED SUBJECT MATTER JURISDICTION

The Appellate Court's standard of review is contained within Missouri Rule of Civil Procedure (M.R.C.P.) 55.27 which establishes the affirmative defense of "lack of subject

matter". Rule 55.27 states:"in law or fact, to a claim in any pleading... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter,...".

The Court in *Hiler v. Dir. of Revenue*, 48 S.W.3d 683, 685 (Mo. Ct. App., 2001) stated: "The circuit court's dismissal for lack of subject matter jurisdiction is a question of law which we review de novo." *Ryan v. Spiegelhalter*, 2001 Mo. App. LEXIS 819 (Mo. Ct. App., 2001) citing *Two Pershing Square, L.P. V. Boley*, 981 S.W. 2d 635, 639 (Mo. App. 1998). Appellant reasserts that there was no evidence provided by respondent to establish by a preponderance of the evidence that the trial court was without jurisdiction as previously addressed in Appellant's Substitute Brief .

The respondent's burden was not met for no evidence was provided by respondent in support of their motion, for no responsive pleadings were submitted by respondent, no depositions were conducted, and no affidavits were submitted by respondent in support of their motion. This case is absolutely devoid of any discovery and the only assertions of fact were provided through appellant's unrefuted affidavit. (ROA pp. 2-4, 95-97).

In *Mabin Constr. Co. v. Missouri Highway & Transp. Comm'n*, 974 S.W.2d 561, 563 (Mo. Ct. App., 1998) the Appellate Court established: "Dismissal for lack of subject matter jurisdiction is proper when it appears by a preponderance of the evidence, that the court is without jurisdiction. In reviewing a trial court's dismissal of a petition, an appellate court must determine if the facts pleaded and the reasonable inferences to be drawn

therefrom state any ground for relief." In *Owner Operator Indep. Drivers Ass'n v. New Prime, Inc.*, 133 S.W.3d 162, 166 (Mo. Ct. App., 2004), the Court of Appeals determined: "Whether there is subject matter jurisdiction is a question of fact left to the sound discretion of the trial court. As such, when the trial court answers that question of fact, an appellate court will review for an abuse of discretion."(emphasis added).

The trial court had no facts provided by respondent upon which to reach the conclusion that trial proceedings must be dismissed. As an absolute minimum, the trial court had jurisdiction over the contract issues raised in Count III.

B. APPELLANT STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED

As explained by this Court in *Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 464 (Mo., 2001), Nazeri V. Missouri Valley College, 860 S.W. 2d 303, 306 (Mo. banc 1993).* "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." Assuming all of appellant's averments are true, would have not resulted in dismissal of appellant's case by the trial court. Once again, as a minimum, the breach of contact claim (Count III) is a recognized cause of action that should not have led to dismissal of appellant's lawsuit. Clearly judicial relief could have been granted independent of the proprietary and

governmental function “tug-of-war”.

The Court of Appeals in *Owner Operator Indep. Drivers Ass'n , supra at 165* stated: “Where the trial court has granted a motion to dismiss after determining that there is no private right of action or that the petition fails to state a claim, an appellate court reviews the trial court's ruling by giving the pleading its broadest intendment and treating all facts alleged as true. In addition to assuming all of the averments in the petition are true, all reasonable inferences therefrom are liberally granted to the plaintiff. No attempt is made to weigh any facts as to whether they are credible or persuasive. Rather, the petition is reviewed in almost an academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in the case. The petition is construed favorably to the plaintiff in order to determine whether the averments contained therein invoke substantive principles of law which entitle the plaintiff to relief.” (emphasis added). The trial court’s review of the Third Amended Petition, giving it the broadest intendment, and having all reasonable inferences liberally granted would not have resulted in this case being dismissed by the trial court, but for an abuse of discretion. The substantive principles of law raised by claims of “whistleblower retaliation”, wrongful termination, and breach of contract were collectively dismissed only through the trial court’s abuse of its discretion and in the face of a litany of facts as provided solely by appellant.

The pleadings cited a substantial factual and legal basis for the petition to survive a motion to dismiss for failure to state of cause of action. The facts and extremely detailed listing of the laws and ordinances which were alleged to have been violated by respondent,

could only have yielded a dismissal if there was an abuse of the trial court's discretion.

III. ARGUMENT

A. THE SUPREME COURT NEED NOT ADDRESS THOSE ISSUES RAISED BY RESPONDENT'S AND AMICI CURIAE'S BRIEFS, FOR RESPONDENT WAIVED SOVEREIGN IMMUNITY TO THE EXTENT THEY MAINTAINED LIABILITY INSURANCE OR PERFORMED A PROPRIETARY FUNCTION

Respondent application for transfer is deemed moot, for the issues they raise relating to sovereign immunity are inapplicable to respondent to the extent the municipal corporation maintained liability insurance *or* performed a proprietary function.

The Amici Curiae Brief, clearly notes on page 8, there are three distinct theories for a tort claim (retaliatory discharge) being brought against a municipality: " (a) an act of the municipality undertaken in its proprietary capacity" (discussed infra) "; **or** (b).... immunity under Section 537.100 [incorrectly cited by Amici; should have cited 537.600] (negligent operation of a motor vehicles or dangerous condition of property), **or** (c) **an insured governmental function** of the municipality." (emphasis added). Appellant submits that category (b) is inapplicable to the instant lawsuit under RSMo. § 537.600, While appellant relies upon category (a) and (c) under RSMo.§ 537.610 to reverse the trial court ruling and sustain the opinion of the Eastern District Court of Appeals.

The issue of proprietary versus governmental function (category (a) supra) need not be addressed by this Court if they accept respondent's admission that liability insurance

(category (c) supra) was maintained by respondent to address appellant's claims. (ROA p. 61).

1. RESPONDENT IS PRECLUDED FROM ARGUING THE TERMS AND CONDITIONS OF THEIR LIABILITY INSURANCE FOR NO SUCH EVIDENCE IS CONTAINED IN THE RECORD ON APPEAL

Respondent's asserts they have liability insurance to address appellant's claims. In "Defendant's Motion to Dismiss," on page 12 (ROA p. 61) of respondent's Trial Court motion states: " Defendant does indeed, maintain liability insurance. See Exhibit C." As previously briefed, in fact, "Exhibit C" was the City of Olivette's Ordinance 20.494, rather than proof of insurance. The admission that insurance exists should suffice for this Court to remand this matter for further trial proceedings by reversing the trial court's improper dismissal of this action. Respondent would have clearly provided documented proof that the coverage they maintain was inapplicable to the instant case if that truly was the case, and they did not. This issue is addressed more fully in appellant's instant brief, Section III. C., infra.

2. RESPONDENT'S PURCHASE OF LIABILITY INSURANCE IS APPLICABLE TO THOSE ACTIONS DEEMED GOVERNMENTAL VERSUS PROPRIETARY FUNCTION

On page 11 of respondent's brief, it is made clear that "when a public entity purchases liability insurance for tort claims, sovereign immunity is waived to the extent of, and for the specific purposes of, the insurance purchased. See Mo.Rev.Stat. § 537.610,

Appendix at A14... ." Any liability insurance purchased by respondent will be applied to "municipalities engaged in the exercise of **governmental function** to carry liability to cover claims arising from the exercise of **governmental functions**" (RSMo. § 71.185). (emphasis added). Thus, even if respondent's act were deemed "governmental function" rather than "proprietary function" (as argued infra), respondent waives the protection afforded by sovereign immunity to the extent of insurance coverage. RSMo. 537.610; *Jungerman V. City of Raytown*, 925 SW.2d 202 (Mo. banc 1996). (the extent of insurance coverage is an issue beyond the scope of this court's review due to respondent's failure to provide proof of the terms or conditions of insurance).

3. RESPONDENT IS NOT AFFORDED SOVEREIGN IMMUNITY TO THE EXTENT APPELLANT'S CLAIMS INCLUDE NON TORT CLAIMS, SUCH AS COUNT III ARISING OUT OF CONTRACT

The sovereign immunity defense, setting aside all other arguments, remains clearly inapplicable to a breach of contract claim, as contained in appellant's Count III.

Appellant's claim of contract breach in no way falls within the gamut of the statutory provisions of RSMo. §537.610 or RSMo. § 71.185, or any other statute referenced by respondent in their Motion To Dismiss. Thus, as an absolute minimum, appellant's contract claim will survive any sovereign immunity defense scrutiny conferred by this Court.

4. THE LIMITS OF LIABILITY AFFORDED A MUNICIPAL CORPORATION, UNDER RSMO 537.610, HAVE NO APPLICATION TO PROPRIETARY MUNICIPAL

FUNCTIONS OR ACTIONS ARISING OUT OF CONTRACT

The sovereign immunity protection afforded for "governmental function" through RSMo. § 537.610.1 and .2, and RSMo.§ 71.185, and so specified caps on liability, ($300,000 per individual and $ 2 million per incident) do not apply to tort actions arising from "proprietary function" and causes of action arising out of contract. On the face of these statutes, it is made clear that appellant's claims, to the extent arising from proprietary municipal function, or arising from other than tort action, are not subject to the statutory dollar limit caps delineated in RSMo. §§ 537.610.1 and .2. *Jungerman, supra.* Conversely, to the extent governmental function is the basis for a cause of action, then the statutory limits of coverage/ liability are put into play.

The appellant, as the plaintiff in *Gavan v. Madison Memorial Hospital*, 700 S.W.2d 124, 126-127 (Mo. Ct. App., 1985), brought a tort and breach of contract claim. In *Gavan*, as in the instant case, the breach of contract claim arose from the employer's policy manual. The Court in *Gavan* at p. 126-7 noted:

> "The doctrine of sovereign immunity and the related doctrine of official immunity have no application to suits for breach of contract. Section 537.600 RSMo 1978... it follows that the trial court erred in sustaining summary judgment on Counts I and II of plaintiff's petition claiming breach of contract. The facts indicate that during her employment with the Hospital plaintiff was presented with the Personnel and Procedures Manual together with a statement that her employment would be governed by the policies stated in the manual. In Arie v. Intertherm, 648 S.W.2d 142,

143, 153 (Mo. App. 1983) this court held such document created contractual rights in the employee without evidence of mutual agreement to this effect and despite the fact that the terms could be unilaterally amended by the employer without notice."....

The Supreme Court in V. S. Dicarlo Construction Co., Inc. v. State, 485 S.W.2d 52, 56 (Mo. 1972), appeal after remand, 567 S.W.2d 394 (Mo. App. 1978) held that <u>when the state enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance just as any private citizen.</u>"(emphasis added).

As with the plaintiff in *Gavan*, appellant in the instant action has a contract claim arising from "personnel and procedures manuals" relating exclusively to employee benefits. The respondent's municipal ordinances, as averred at length in appellant's amended petitions, should have made certain retirement benefits, sick leave, etc. available to all municipal employees. In turn, respondent "lays aside whatever privilege of sovereign immunity it otherwise possesses." Despite respondent's assertion that appellant's contract claim is " inextricably intertwined with his wrongful discharge claim" no set of facts or case law has been provided by respondent to support this "homespun" defense. (See Respondent's Substitute Reply Brief, footnote 7, p.21 and 22).

In summary, respondent inappropriately attempts to seek shelter from liability via sovereign immunity, a protection not afforded respondent to the extent respondent maintains liability coverage or conducted a proprietary function in terminating appellant. The statutory limits of liability afforded a municipality have no bearing on proprietary

municipal function nor non-tort claims (i.e contract claim). This Court need not decide the issue of municipal function, be it proprietary or governmental, in light of the existence of respondent's liability insurance. Further, to the extent sovereign immunity is deemed a proper defense to appellant's tort claims, sovereign immunity is absolutely inapplicable to appellant's contract claims as asserted in Count III.

B. THE TRIAL COURT DID ERR AND ABUSE ITS DISCRETION BY SUSTAINING RESPONDENT'S MOTION TO DISMISS BECAUSE APPELLANT DID STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED IN THAT RESPONDENT WAS ACTING IN A PROPRIETARY FUNCTION AND THUS NOT SUBJECT TO THE DOCTRINE OF SOVEREIGN IMMUNITY

Respondent, in sections A.1- A.4 of their Substitute Brief, and the Amici Curiae Brief, inappropriately attempt to categorize the wrongful termination of a whistle blower as a "governmental function." In response, appellant relies upon this Court's ruling in *Jungerman at* p. 204 regarding sovereign immunity:

> "The term "sovereign immunity" does not strictly apply to the immunity possessed by municipalities. Under common law, true sovereign immunity applies only to the state and its entities, preempting all tort liability. This full immunity never applied to municipalities. Rather, municipal corporations have a more limited immunity only for governmental functions, those performed for the common good of all."Id. H.N. 3. (emphasis added).

The respondent's acts of retaliating against a whistle blower were not "governmental functions" performed for the "common good of all", and thus sovereign immunity does not apply to respondent. Respondent incorrectly asserts on p. 11 of their Reply Brief "Kunzie's allegation impliedly concedes the City's termination of his employment constituted a governmental act." This statement is without merit and perplexes appellant, for the opposite is the case.

As noted in the Appellate Court opinion in the instant case, municipal corporations, such as the City of Olivette, have only limited immunity and only for governmental functions; they do not enjoy sovereign immunity in tort while performing proprietary functions. *Junior College District of St. Louis V. City of St. Louis*, 149 S.W. 3d 442, 447 (Mo. banc 2004). Governmental functions also have been described as part of a municipality's delegated police powers, as compared to proprietary actions, which are part of a municipality's private corporate enterprises. *City of Hamilton V. Public Water Supply Dist. No. 2 of Caldwell County*, 849 S.W. 2d 96, 102 (Mo. App. WD 1993). It is further noted that a municipality cannot escape responsibility for the careful performance of a duty which is substantially one of a proprietary nature, such as the termination of appellant, a private enterprise function. The termination of an municipal employee, be it a proper or an illegal act, can in no way be interpreted as a governmental function for the "common good of all." *Davis V. City of St. Louis*, 612 S.W. 2d 812, 814 (Mo. App. E.D. 1981).

The acts of the Respondent, be it wrongfully terminating appellant, are addressed in Respondent's Employee Handbook (Handbook; ASBR pp. A 65-A 98). The Handbook

highlights every aspect of the employment relationship between employer and employee, as would be the case for any private corporation. The Handbook provides respondent with a template on how to handle their personnel decisions. By adopting the Handbook, respondent adopted the role of a private enterprise or corporation. Not a single component of the Handbook relates to the "good of all." The Handbook identifies how respondent would hire, promote, provide benefits, discipline, and terminate an employee. The Handbook identifies how employer and employee would address complaints and investigations. None of these "corporate" functions had anything to do with the taxpaying public or collective "good of all." The record on appeal lacks detailed facts upon which to surmise that the "good of all" was placed ahead of the employer-employee relationship. Thus a claim to sovereign immunity protection by respondent is without merit in fact or law. To the extent respondent controlled the right to manage their personnel, including the hiring and firing of personnel, they waived that slice of state power and take on the role of a private enterprise/ employer and leave behind the privilege of sovereign immunity.

Further as argued supra, respondent is not the "state and its entities". *Jungerman* continues at p.205:

"Under the discretionary immunity doctrine, a city is not liable for the manner in which it performs discretionary duties. (citations omitted). Missouri cases on municipal liability do not define discretionary acts other than with words like "judicial" or "legislative." (citations omitted; emphasis added).

The Court in *Jungerman* clearly support appellant and dispel respondent's claim of

sovereign immunity for respondent was not performing “judicial or legislative” acts when they retaliated against a whistleblower and wrongfully terminated appellant. Therefore, sovereign immunity is not a shield to respondent’s liability for their acts from which the instant cause of action arose. *Green V. Lebanon R. III Sch. Dist*., 13 SW 3d 278, 284 (Mo. 2000).

As stated in *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 294-5 (Mo. App. 1983) to determine whether the city was acting in a proprietary or governmental capacity, we look to the nature of the activity:

> “A municipality functions as a body politic, as an organ of government, and also as a body corporate, an artificial personality or corporation; "hence it has dual obligations." Through the years these dual obligations have served as a basis to chip away at sovereign immunity as applied to municipalities. Since "[a] municipal corporation, by its nature, can perform both proprietary and governmental functions," in deciding if a municipality can be sued in a particular instance "a court must look to the nature of the activity performed to determine in which capacity the city has acted." "A governmental duty is one which is performed for the common good of all. A duty will be deemed proprietary if it is performed for the special benefit or profit of the municipality as a corporate entity." A municipality may be held liable for torts arising out of the performance of proprietary functions but no recovery is allowed for injuries which result from the performance of governmental functions.”(emphasis added).

Respondent's Handbook was adopted for the special benefit of respondent and its employees, thereby conferred proprietary /"corporate actions," upon the respondent. This allowed respondent to manage their personnel matters as they so chose and for their "special benefit". The ability to address personnel matters as the respondent mandated clearly was for respondent's "special benefit." There is no legitimate basis for respondent to contend that a personnel matter was for the "good of all." Clearly, the distinction between "governmental" and "proprietary" duties is often obscure. A "governmental duty" has also been defined as a duty which is performed "by the governmental unit as an agent of the state." *Allen v. Salina Broadcasting, Inc*., 630 S.W.2d 225, 227 (Mo. App. 1982). A proprietary function entails those acts performed for the special benefit of the municipal corporation, n1 *Davis V. City of St. Louis*, 612 S.W.2d 812, 814 (Mo. App. 1981), in that it provides local necessities and conveniences to its own citizens. *Allen*, 630 S.W.2d at 227. (emphasis added). The guidelines established by the Employee Handbook as to how to hire, promote, provide benefits, discipline, or terminate an employee (premised upon legal or illegal motive) is clearly to provide "local necessities and conveniences to its own citizens", and not for the "good of all." In addition, through respondent's adoption of a "Home Rule Charter" to the degree motivated by "local necessities and conveniences to its own citizens" denounced the Jefferson City General Assembly's (State of Missouri) control over proprietary functions.

Respondent inappropriately cites *Fantasma V. Kansas City, Missouri Board of Police Commissioners*, 913 SW. 2d 388, 391 (Mo. App. W.D. 1996) (citing *Spotts v.*

Kansas City, 728 S.W.2d 242, 247 (Mo. App. 1987)) for the proposition that respondent's public works department personnel matters are governmental function. The Court in *Fantasma* distinguished a police commission from a municipality as follows: "...assuming that the City "purchased" liability insurance within the meaning of §§ 537.610 does not establish that respondents..." (Board of Police Commissioners)"... purchased insurance because the City and respondents are separate entities... The Board is not a municipality, but rather a legal subdivision of the state."

To the degree respondent's actions encompassed "proprietary function," no sovereign immunity protection exists. *Jungerman*, *supra* at p. 204. Further, appellant worked in the public works department, which is not subject to the mandates of an independent municipal commission, as was the case in *Fantasma*. Thus respondent incorrectly attempts to gain the sovereign immunity protection afforded a police commission, which is not afforded a municipality,

Lastly, respondent relies on speculation to establish appellant was terminated under a "governmental function." The court in *Dugan v. Kansas City,* 373 S.W.2d 175 (Mo. App. 1963), in addressing such speculation noted:

> "the trial court erred in sustaining a city's motion to dismiss where it was "not possible, without speculation, to know from the face of the petition" whether the city's function was governmental or proprietary."

As in the instant case, it was improper for the trial court to dismiss appellant's case without the benefit of discovery and additional facts upon which to base a dismissal.

The arguable lack of detail in categorizing respondent's actions as a "proprietary" versus "governmental" function was also echoed in the Amici Curiae Brief pages 11-12. As such, dismissal by the trial court was an abuse of discretion.

In summary, respondent attempts to seek shelter from liability through the inappropriate reference to sovereign immunity, clearly protection not afforded respondent, a municipal corporation conducting proprietary functions. The above cited cases establish respondent cannot avail themselves of the privilege of sovereign immunity in terminating a whistle blower as a proprietary functions, *not* for the common "good of all."

C. RESPONDENT INAPPROPRIATELY ARGUES THE TERMS AND CONDITIONS OF THE LIABILITY INSURANCES THEY PURCHASED, FOR THE RECORD ON APPEAL IS DEVOID OF ANY PROOF OF THE LANGUAGE OF INSURANCE COVERAGE

In response to respondent's assertion in section A.2 and A.4., respondent made the admission that they maintain liability insurance applicable to Appellant's tort claims, although appellant's Count III encompasses a breach of contract claim. Respondent failed to provide proof of insurance as discussed supra. Respondent's "five bites of the apple," as eluded to in Appellant's Substitute Brief, highlights the inappropriateness of respondent now espousing the terms of coverage upon which respondent relies, without evidence of such coverage. See Respondent's Reply Brief p. 19.

Respondent references the limits of "MOPERM" coverage and cites cases relating

to insurance coverage in sections A.2 and A.4. This is deemed inappropriate in circumstances where the Record on Appeal is devoid of any proof of such insurance, let alone the terms of the alleged insurance coverage pursuant to 537.610(1). (incorrectly cited by Respondent as 567.610 (1) in Respondent's Reply Brief). Argument presented by respondent pertaining to the terms or scope of insurance coverage is similarly inappropriate for this Court to consider in light of a Record on Appeal devoid of such evidence.

As this Court determined in *Land Clearance for Redevelopment Authority v. Kansas University Endowment Ass'n*, 805 S.W.2d 173 (Mo. banc 1991); *State ex rel. Laszewski v. R.L. Persons Construction, Inc.*, 136 S.W.3d 863 (Mo. Ct. App. 2004), a party may not present new evidence in support of a defense or legal argument, in this case the retention of liability insurance under RSMo. Chapter 537.610, in the aftermath of judicial proceedings. As explained in the proceeding paragraph, the absence of proof of insurance is of no surprise to respondent. As this Court stated in *Land Clearance*, "An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Land Clearance*, 805 S.W.2d at 176.

As a result, respondent's assertion that liability insurance exists, as an afterthought without a Record on Appeal supporting such assertions, should be summarily rejected by this Court. The Record on Appeal does not carry the merit of respondent's argument.

D. MANAGEMENT OF A MUNICIPAL DEPARTMENT DOES NOT CONSTITUTE A GOVERNMENTAL FUNCTION, BUT RATHER A PROPRIETARY FUNCTION

Respondent, in section A.3., and the Amici Curiae Brief [2] incorrectly draw a correlation between the "governmental function"(i.e. operation) of a municipal police department in *Jungerman, supra* at p. 205 and respondent's operation of municipal corporation. Clearly the "operation" of a police department is for "the "good of all citizens." Without such services lawlessness would prevail. On the other hand, respondent's unfettered retaliation against appellant, a whistle blower assigned to the Public Works Department, was not for the "good of all", for such retaliation could and did cloak the disclosure of unsafe and illegal conditions which were not for the "good of all."

The governmental function of a fire department's operation, as cited by respondent in *Theodoro V. City of Herlaneum*, 879 S.W. 2d 755 (Mo .App 1994), also promotes the "good of all" to the extent fires are contained and other emergencies are responded to for

---

[2]As asserted by Amici, their brief relies solely upon the distinction between proprietary and governmental function. Amici acknowledge that respondent can, in the alternative, be held accountable for their actions to the extent they performed a governmental function and procured liability insurance. Respondent has clearly affirmed the existence of such insurance. See Amici Brief p. 8.

the benefit and "common good of all." Yet, appellant provides a similar counter argument, that a fire department's retaliation against a whistle blowing member of the fire department would clearly not be for "the common good of all."

The operations of a fire or police department are distinct from the personnel actions of those same departments.

The respondent and amici also incorrectly rely upon *Aiello v. St. Louis Community College Dist*., 830 S.W.2d 556 (Mo. Ct. App. 1992) which relates to the proprietary/ governmental distinction present for school districts. School districts are viewed differently than municipalities, with school districts enjoying a slice of state power. As noted by this Court in *Aiello* at p. 558 : " more recent decisions of the Missouri Supreme Court "cast doubt on applying the proprietary-governmental distinction to school districts." If we apply the governmental-proprietary distinction to school districts, defendant in this case was performing a government function and therefore, is immune to suit." HN2 The distinction between governmental and proprietary duties is sometimes obscure."

Further, respondent and Amici rely upon the ruling of the 8th Circuit in *Nichols v. City of Kirksville*, 68 F.3d 245, 247-248 (8th Cir. 1995). As noted in Appellant's Substitute Brief, federal court interpretation of the law has no precedence setting value before this Court, yet it can provide sound reasoning and insightful analysis applicable to issues presented before this Court. Respondent and Amici cite the Nichols case, which contains neither reasoning nor analysis. The *Nichols* court contends that hiring and firing

city employees is a governmental, not proprietary function. This contention is premised upon a 1928 ruling from this Court in *State ex rel. Gallagher v. Kansas City*, 319 Mo. 705, 7 S.W.2d 357, 361 (Mo. 1928) (en banc). Such a finding turns a blind eye to the statutory history of sovereign immunity which included: the common law doctrine of sovereign immunity before 1977; the impact of *Jones V. State Highway Comm'n*, 557 S.W.2d 225 (Mo. banc 1977), which abrogated the common law doctrine of sovereign immunity; the legislative enactment of RSMo. §§§§ 537.600 to 537.650, in 1978 in response to *Jones* ; the impact of *Bartley V Special School District of St. Louis City*, 649 S.W. 2d 864 (Mo banc 1983) and ; the 1985 amendment of §§ 537.600. The 8th Circuit in *Nichols* relied upon the inapplicable findings in *Gallagher* (1928) to establish hiring and firing in a union setting (unlike the instant case) was a "governmental function." The 8th Circuit opinion is totally devoid of legal analysis or pertinent facts upon which to correlate to the possible outcome of the instant case.

Respondent also misapplies the case of *Shrill v. Wilson*, 653 S.W.2d 661, 669 (Mo. banc 1983) in which the Supreme Court found that hiring is a discretionary function, and that there should be no right of action against a public official for alleged negligence in the hiring process. *Shrill* can be distinguished from the instant case for *Shrill* related to a negligent hiring claim. Similarly, respondent inappropriately relies on the court opinion in *Gavan v. Madison Memorial Hospital*, 700 S.W.2d 124, 128 (Mo. Ct. App. 1985) which concluded decisions regarding firing are of the same character as hiring. The *Gavan* court concluded hiring decisions are deemed to be a discretionary function

and protected by official immunity, and thus it follows that discharging or firing is also protected. Respondent is in effect asking this Court to construe a negligent hiring case to apply to the wrongful termination of a whistleblower, in the instant case. Such a leap of faith is far afield from the intent of *Gavan* and *Shrill*.

Thus appellant exercised free speech to complain of whistleblower retaliation, long before the date of his wrongful termination and to uphold appellant's refusal to violate the law and contravene the strong public policy interests of free speech. *Boyle v. Vista Eyewear, Inc*,700 S.W.2d 859 (Mo.App.W.D.1985). Respondent's attempt to side step liability through sovereign immunity is not supported by applicable case law, statutory enactment, or the limited facts in this case.

Respondent's act of retaliating against a whistleblower were not "governmental functions" performed for the "common good of all", and thus sovereign immunity does not apply to respondent.

IV. CONCLUSION

In conclusion, due to the proprietary function performed by respondent in retaliating against a whistleblower and breaching their contractual relationship with appellant, respondent was not engaged in activity for the "common good of all." Thus, sovereign immunity protection is not available to respondent. To the extent this Court determines respondent's acts fall within the realm of governmental function, then respondent waived sovereign immunity protection to the extent they maintained liability

insurance.

As cited in appellant's previous brief, U.S. Supreme Court Justice Stevens aptly stated in *Hess V. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 34, 115 S. Ct. 394, 404 (1994), "Sovereign immunity inevitably places lesser value on administering justice to the individual than on giving government a license to act arbitrary...."

For the reasons stated above, appellant respectfully requests that this Court concur with the Court of Appeal's ruling in reversing the trial court's order sustaining respondent's motion to dismiss thereby stripping respondent of the privilege of "acting arbitrary" and retaliating against a whistle blower, and any other remedy deemed proper by this Court.

Respectfully Submitted,

By:_____

Donald K. Murano, # 36953
Guinness, Buehler & Murano LLC
415 North Second Street
St. Charles, Missouri 63301
Tel.(636) 947-7711
Fax (636) 947-7787

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that appellant's brief complies with the limitations set forth in Rule 84.06. According to the word count function of Corel WordPerfect 9, the foregoing brief contains 5,240 words.

The undersigned also certifies that the floppy disk filed with appellant's brief has been scanned for viruses and is virus-free.

_____

Donald K. Murano, # 36953
Guinness, Buehler & Murano LLC
415 North Second Street
St. Charles, Missouri 63301
Tel.(636) 947-7711
Fax (636) 947-7787

Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on October 31, 2005, two copies of Appellant's Substitute Reply Brief was mailed to opposing counsel, and one original and ten copies and one floppy disk was provided to the Missouri Supreme Court containing Appellant's Substitute Reply Brief which hand delivered to the Supreme Court of Missouri in Jefferson City, Missouri and via regular mail to opposing counsel:

James Foster, Esq. (Respondent; via regular mail)
McMahon, Berger, Hanna, Linihan
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131-3039

John M. Hessel, Esq. (Amici Curiae; via regular mail)
Lewis, Rice, LLC
500 North Broadway, Suite 2000
St. Louis, Missouri 63102

Clerk of the Supreme Court of Missouri (via hand delivery)
207 West. High Street
Jefferson City, Missouri 65101
Contact phone number: (573)-751-4144

_____
Donald K. Murano, Esq. # 36953